**Atlantic Industrial Constructors, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local #10, AFL–CIO, Petitioner.** Case 5–RC–14250

September 17, 1997

## DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered determinative challenges and objections to an election held on January 26, 1996, and the hearing officer's report recommending disposition of them (pertinent parts are attached as an appendix). The election was conducted pursuant to a Decision and Direction of Election dated October 20, 1995. The tally of ballots showed 9 for and 7 against the Petitioner, with 4 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations, and finds that the election must be set aside and a new election held.

In adopting the hearing officer's recommendation to set the election aside on the basis of objections pertaining to the erroneously incomplete description of the voter eligibility formula contained in the Decision and Direction of Election, we note the credited evidence that the Employer relied on that articulation of the formula in preparing an *Excelsior* list including two ineligible voters, and we conclude that such reliance was reasonable. We further note that those two ineligible voters cast unchallenged ballots in the election as a result of the error and that their votes could be determinative.[2]

Contrary to our dissenting colleague, we would not find the Agency's erroneous statement of the formula harmless simply because the Employer had potential access to labor counsel. Since the election directions sent to the Employer contained specific references to ''working days'' in the instructions concerning the notice posting, the Employer had reason to believe that this term would have appeared in other references to ''days'' if that were intended. There was, therefore, no discrepancy or ambiguity on the face of the eligibility formula statement that would put the Employer on notice that consultation with counsel or inquiries to the Board were advisable. Therefore, unlike our dissenting colleague, we would not make the result in this case turn on whether or not the Employer sought legal counsel.

Moreover, the Agency had the public responsibility for setting forth clearly, in its Decision and Direction of Election, what the voter eligibility requirements were. Such clarity is expressly called for in *Steiny & Co.*, 308 NLRB 1323, 1327 fn. 13 (1992). Where, as here, that is not done, and confusion is the result, the Agency has a responsibility to set the election aside.[3]

[Direction of Second Election omitted from publication.]

CHAIRMAN GOULD, dissenting.

The majority has decided to sustain portions of the Employer's Objections 5, 6, and 19, finding that the description of the *Daniel*[1] eligibility formula in the Decision and Direction of Election led to the Employer's confusion over the application of that formula.[2]

[1] The Employer and the Petitioner have implicitly excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions less the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] Although we take account of this potential impact on the election results, we are in no way repudiating Board precedent barring post-election challenges. *Solvent Services*, 313 NLRB 645 (1994) (reaffirming that a challenge is permitted as an exception to the general rule against post-election challenges where the Board or the party benefiting from imposition of the rule knew of the voter's ineligibility, and suppressed the facts); *Sears Roebuck & Co.*, 114 NLRB 762, 763 fn. 1 (1955). Here, as noted above, the casting of votes by these two ineligible voters was directly attributable to an undisputed error in the eligibility formula contained in the Regional Director's Decision and Direction of Election.

[3] Member Higgins also finds that the Regional Director should have granted the Employer's request to amend the October 26, 1995 *Excelsior* list, and should have changed the October 15, 1995 voter eligibility cutoff date, in light of the repeated postponements of the election from the initially scheduled date of November 17, 1995, until January 26, 1996. During that period of time, there were three postponements, two of which were caused by government shutdowns. By retaining the October 15 eligibility date, and the corresponding *Excelsior* list of October 26, we have the anomalous situation where *ineligible* employees worked for longer periods than some employees who were eligible under the *Daniel* formula. In the unusual circumstances of this case, Member Higgins would have revised the eligibility date and the list.

Member Fox finds it unnecessary to reach this issue in light of her adoption of the hearing officer's recommendation to sustain the Employer's objections pertaining to the erroneous description of the voter eligibility formula.

[1] *Daniel Construction Co.*, 133 NLRB 264, as modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992).

[2] In the Decision and Direction of Election, the Regional Director stated, inter alia:

> Therefore, I shall apply the *Daniel* formula to determine eligibility of employees in this case. Thus, in addition to those eligible to vote under the traditional standards, laid-off employees are eligible to vote in an election if they were employed by the Employer for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment by the Employer in those 12 months and have been employed for 45 days or more within the 24-months period immediately preceding the eligibility date. Of those eligible under this formula, any employees who quit voluntarily or had been terminated for cause prior to the completion of the last job for

*Continued*

The hearing officer found that the Employer's bookkeeper, at the direction of its president, mistakenly added the names of two ineligible voters, employees Norton and Johnson, on the *Excelsior* list. Although each employee had been employed for at least 30 ''calendar'' days, neither Norton nor Johnson had a total of 30 ''working'' days within the required 12-month period established by the *Daniel* formula. The hearing officer further found that this mistake was not discovered by the Employer's president until after the election was held.

Unlike my colleagues, I would overrule all the Employer's objections, reject the hearing officer's recommendation to set aside the January 26, 1996 election, and issue a Certification of Representative. Here, the Employer's mistaken inclusion of two ineligible voters on the *Excelsior* list was easily preventable had the Employer's president and bookkeeper simply conferred, during the preparation of the *Excelsior* list, with the experienced labor counsel who has represented the Employer throughout these proceedings. If they had done so, they would have discovered that the *Daniel* formula has always been premised on a concept of ''working'' days.[3]

When an employer freely chooses not to take the opportunity to seek retained counsel's assistance, guidance, and clarification on *Excelsior* list issues, the scale of fairness, in my view, tips in favor of treating the objections to the *Excelsior* list as impermissible postelection challenges. See *Norris, Inc.*, 63 NLRB 502 (1945), revd. on other grounds 162 F.2d 50 (5th Cir. 1947). Contrary to my colleagues' suggestion, I am not imposing an extra burden on those employers who choose to be represented by counsel on election matters. Rather, I disagree with the majority's conclusion that the Employer here acted reasonably when it did not seek out its own counsel's assistance. In my opinion, such inaction by the objecting party should not provide a basis for setting aside the election. Therefore, I dissent.

which they were employed is [sic] excluded and disqualified as eligible voters.

[3] See *Daniel Construction Co.*, supra at 167 NLRB 1080–1081.

## APPENDIX

## HEARING OFFICER'S REPORT ON CHALLENGES AND OBJECTIONS

### II. CHRONOLOGY AND SUMMARY OF ISSUES

The Employer is a Virginia corporation engaged in the installation of industrial equipment and is an Employer engaged in the construction industry. The parties have had a collective-bargaining relationship since 1989. The most recent multiemployer 8(f) agreement to which the parties were bound was effective by its terms from September 1, 1992, through August 31, 1995. The Petitioner filed a petition for an election on September 7, 1995. Following a representational hearing, on October 20, 1995, a Decision and Direction of Election issued. Among the issues addressed during the hearing and in the Decision and Direction of Election was the evolution and application of the *Daniel* formula[7] in the construction industry in order to determine voter eligibility for elections. In the Decision and Direction of Election, at page 20, the Regional Director confirmed that the *Daniel* formula would be applied to determine the eligibility of employees in this case and commented:

> Thus, in addition to those eligible to *vote under the traditional standards*, laid-off unit employees are eligible to vote in an election if they *were employed by the Employer for 30 days* or more within the 12 months preceding the eligibility date for the election, or if they have had some employment by the Employer in those 12 months and *have been employed for 45 days or more* within the 24-months period immediately preceding the eligibility date. Of those eligible under this formula, any employees who quit voluntarily or had been terminated for cause prior to the completion of the last job for which they were employed is [sic] excluded and and disqualified as eligible voters. [Emphasis added.]

October 15, 1995, was established as the eligibility date. On October 27, 1995, the Employer submitted its *Excelsior* list,[8] including therein unit employees who were employed as of the October 15, 1995 eligibility date and those employees who had been employed for 30 calendar days (rather than 30 working days) within the preceding 12 months or employed for 45 calendar days (instead of 45 working days) within the prior 24 months. (The Employer's inclusion of certain employees who were ineligible to vote on its *Excelsior* list is the subject addressed in Objections 5, 6, 7, 8, 9, 10, and 19.) The Employer also erroneously included on the *Excelsior* list another employee who had resigned and the Employer failed to include on the list an employee who was apparently employed as of the eligibility date but who transferred to Utah thereafter.[9]

Thereafter the election was scheduled, postponed, and rescheduled a number of times. (The delays caused by the rescheduling of the election are addressed in the discussion of the challenged ballots as well as in Objections 1, 2, 3, 4, 11, 13, 15, 16, 17, and 19.) The election was originally scheduled for November 17, 1995. Notices of Election for the November 17, 1995 election were posted at the Employer's facility and copies of the Notice were mailed to the voters on the *Excelsior* list. That notice and each subsequently posted notice properly set forth employees' rights and the mandatory requirements by the parties to the election. However, the

[7] That formula was articulated in *Daniel Construction Co.*, 133 NLRB 264 as modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992).

[8] *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239 (1966), requires that within 7 days of the direction of an election, the employer must file with the Regional Director an eligibility list containing the names and addresses of all eligible voters. The Regional Director, in turn, shall make this information available to all parties. Failure to comply with this requirement may be grounds for setting aside the election whenever proper objections are filed.

[9] None of these errors was discovered until after the January 26, 1996 election.

first election notice for the November 1995 election also contained an apparent misprint or typographical error since it contained two sections captioned ''Inclusions'' in its description of the bargaining unit and no ''Exclusions'' therefrom. Thus the first paragraph captioned ''Inclusions'' properly describes the bargaining unit (see description on p. 2, above), however, the second of the two paragraphs captioned ''Inclusions'' describes, inter alia, noncraft employees and employees from another facility, as well as statutory exclusions.[10] (See further discussion of this error under Objection 14.)

On November 3, 1995, the Board agent sent the Employer a letter confirming the details of the scheduled November 17, 1995 election. Set forth in the letter was an abbreviated description of the *Daniel* formula and language directing the Employer to post the election notice for 3 working days prior to the election. (Emp. Exh. 12.)

Due to a government shutdown, the November 17, 1995 election was postponed and rescheduled for December 1, 1995. Thereafter, on November 28, 1995, the Petitioner faxed to the Regional Office an unfair labor practice charge (Emp. Exh. 7) alleging that the Employer had violated Section 8(a)(1), (3), and (5) of the Act by, inter alia, unlawfully changing terms and conditions of employment, laying off union members, and packing the bargaining unit. The December 1, 1995 election was postponed on November 29, 1995, because the charge was perceived to constitute a duly filed blocking charge. However, since filing of charges via facsimile had not yet been authorized by the Agency as of the date the charge was received, the election had erroneously been blocked in the absence of receipt of any effective service of the charge. (This error served as a basis for Objection 11.) It has been stipulated by counsel for the Regional Director that the postponement of the December 1, 1995 election was in error as it was based on service of a faxed charge[11] before such service had been authorized by the Agency. Once the error was realized, the Regional Director so informed the parties and, thereafter, the election was rescheduled for December 22, 1995.

On December 21, 1995, the election scheduled for the next day was postponed because the Agency was again forced to close due to a partial government shutdown. Following a series of other scheduling problems attributable to the Employer's holiday recess, snowstorms, and the government shutdown, the election was not scheduled to be held until January 26, 1996. In the interim, during November and December 1995, the Employer hired four new unit employees. On January 19, 1996, the Employer filed with the Regional Director a Motion to Dismiss Petition or in the Alternative to Amend the *Excelsior* List after the election had been rescheduled for the third time. In its motion, the Employer requested leave to amend the *Excelsior* list to include employees who were hired after the eligibility date and to exclude from the *Excelsior* list certain employees who were no longer employed. That motion was denied by the Regional Director on January 23, 1996. The Regional Director instructed the Employer to utilize the challenged ballot procedure to address voter eligibility at the election. (The refusal to permit an amendment of the *Excelsior* list resulted in the employees who were hired after the eligibility date voting challenged ballots, and that refusal also involves Objections 1, 2, 3, and 19.)

The election was held January 26, 1996, some 2 months after it had originally been scheduled and some 3 months after the October 15, 1995 eligibility date. (The rescheduling is a key issue and is addressed, under various guises, in the challenged ballots as well as in Objections 1, 2, 3, 4, 11, 13, 15, 16, 17, and 19.) Just as the election was commencing, one of the Petitioner's business representatives was briefly observed to be in the vicinity of the doorway to the voting room. However, he left immediately on the request of the Board agent. (This conduct served as the basis of Objection 12.) While neither the Employer nor the Petitioner challenged any voters during the election, the four new unit employees were challenged by the Board agent because they were not on the *Excelsior* list. (Hence the four challenges addressed herein and the origin of Objections 1, 2, and 3.) Those challenges were determinative of the results of the election.

Several days after the election, in conferring with legal counsel, the Employer discovered that it had erroneously counted calendar days rather than working days in determining the eligibility of laid-off employees. It was then discovered that the *Excelsior* list contained the names of several employees who were ineligible to vote, because they had not worked the requisite number of days. The Employer has attributed this misunderstanding to the alleged misstatement of the *Daniel* eligibility formula contained in the Decision and Direction of Election (see excerpt referenced at pp. 7–8, above) and has stated that further confusion was caused by the eligibility language contained in the Notices of Election and in the Board agent's November 3, 1995 letter. (The issue of the *Daniel* eligibility language relates to Objections 5, 6, and 19.) Since the Petitioner did not challenge any of the voters during the election, it was the Employer's view that the Petitioner must have knowingly permitted ineligible voters to cast unchallenged ballots during the election. (Such allegations were the subject of Objections 8, 9, and 10.)

OBJECTION 1

**The Regional Director erred in denying the Employer's motion to amend the *Excelsior* list when the original list was submitted on October 26, 1995, but when the election was not held until January 26, 1996, after three postponements. By the date of the election, the *Excelsior* list was stale and did not represent the actual complement of employees.**

OBJECTION 2

**The Regional Director erred in challenging the votes of four individuals. The employees whose votes were challenged are permanent employees and have a stake in the outcome of the election.**

[10] That typographical error was corrected, however; and it did not appear in subsequent notices which were posted to announce the dates, times, and locations of each of the rescheduled elections.

[11] The aforementioned charge was eventually filed at some date unspecified in the record. The Regional Director has stipulated that, once the charge was properly filed, he did not, thereafter, permit that charge to block the election. The Employer's president, Mr. Upshur, testified without contradiction at the hearing that the charge remained pending as of the date of the hearing.

OBJECTION 3

**The four challenged voters should have been permitted to vote because their cumulative work days with the Employer outnumber the number of days worked by five employees listed on the *Excelsior* list.**

1. The evidence offered in support of Objections 1, 2, and 3

Each of these objections address the viability and adequacy of the *Excelsior* list in light of the delay attendant to proceeding to the election. The objections contend that the aforementioned four challenged voters should either have been added to the *Excelsior* list or should not have been challenged at the election. In support of these three objections, the Employer presented the same testimony, assertions, and documentary evidence previously described above in regard to the challenged ballots and that evidence need not be reiterated. That evidence was supplemented, however, as described below.

Mr. Upshur stated that, because of the nature of the work in the construction industry, the Employer's employee complement varies considerably depending on the availability of work. Mr. Upshur asserted that although the four challenged voters were hired after the eligibility date, they had worked longer for the Employer as of the date of the election than had certain other individuals whose names were on the *Excelsior* list. Thus, the Employer's documentary evidence and Mr. Upshur's testimony indicate that several employees whose names were included on the *Excelsior* list worked for fewer days before the election than did the four new hires.[14] It was Mr. Upshur's view and the Employer's argument in its brief that the new hires have a greater stake in the outcome of the election than do other individuals who have not worked for the Employer for over 18 months. Accordingly, Mr. Upshur opined that the *Excelsior* list should have either been amended to include the four new hires or, in the alternative, their eligibility should not have been challenged at the election. Mr. Upshur relied on the aforementioned time records of those four employees (see Emp. Exhs. 9 (A)-(D) and 13) as well as Employer Exhbit 5, the aforementioned flow chart which Mr. Upshur had prepared to illustrate the periods of employment of various groups of employees.

Mr. Upshur asserted that the Employer made the request to amend the *Excelsior* list not only because of the new hires, but also because it was Mr. Upshur's perception after December 1, 1995 (Tr. 113), that he would be unable to contact some of the people on the *Excelsior* list.[15] While the Employer's January 9, 1996 motion to amend the *Excelsior* list does state that some individuals on the list are no longer with the Company, the motion does not aver that the Employer would be unable to contact such individuals. (See Emp. Exh. 10.)[16] Mr. Upshur confirmed that, after he was advised by the Regional Director that the new hires could vote a challenged ballot, Mr. Upshur directed his foremen to so inform the new hires.

2. Analysis and Conclusions Regarding Objections 1, 2, and 3

A. *Analysis of Objection 1*: Based on the facts, I find that the Regional Director appropriately concluded that the issue of the eligibility of the four new hires and the alleged staleness of the *Excelsior* list could be effectively addressed in the instant proceeding.[17] The instant hearing provided the parties with a full opportunity to present witnesses and documentary evidence as well as legal arguments in support of their respective positions. However, I find that insufficient basis was proffered during the hearing or in the posthearing briefs to demonstrate that, because of the 2-month delay occasioned after the election was first scheduled in November 1995, the *Excelsior* list should be considered stale.

The Employer's posthearing brief alleged that Section 101.19 of the Board Rules and Regulations and Statement of Procedures and Section 11212.4 of the NLRB Representation Casehandling Manual provides that the *Excelsior* list should be kept up to date while the election procedures are pending. However, those provisions indicate that it is incumbent on the parties to keep the *Excelsior* list current by, inter alia, mutually agreeing to changes on the list and by performing a preelection check of the list to iron out eligibility questions among themselves prior to the election. There is no assertion or evidence, however, that the parties agreed to any changes to the *Excelsior* list or that they were not provided with a preelection check of the *Excelsior* list.

The Employer also argued in its brief that, under the authority of *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 717 (1994), the new hires should be deemed to share a community of interest with unit employees. The cited case is factually distinguishable and is inapposite as it explored the legal principles attendant to defining an appropriate bargaining unit and addressed the issue of whether a production and maintenance unit or a plantwide unit would be considered appropriate. By contrast, the instant case is not concerned with defining which craft employees are to be included in the bargaining unit. Objection 1, 2, and 3 concern the voting eligibility of certain employees who are included in the craft encompassed by the bargaining unit. These objections seek

[14] The Employer is also asserting as a basis for Objections 5–10 that four of the employees who allegedly had not worked as many days as certain of the new employees had erroneously been included on the *Excelsior* list.

[15] During the hearing, Mr. Upshur also asserted that the Regional Director should have permitted the deletion of certain names from the *Excelsior* list because some employees had not been employed by the Employer for over a year.

[16] Mr. Upshur also testified that the Employer's January 9, 1996 request to amend the *Excelsior* list should have been permitted to exclude the names of Bobby Carter, a foreman who quit on May 17, 1995, and George Norton, who was not on the payroll for the requisite number of days. However, Mr. Upshur confirmed that he did not discover until after the election was over that those two employees should never have been included on the *Excelsior* list. (See evidence produced in support of Objection 5 below.)

[17] The Petitioner asserted in its posthearing brief that, after the conclusion of the instant hearing, the Board denied the Petitioner's motion to amend the *Excelsior* list on its merits. Contrary to the Petitioner's position in its brief, however, the Board's denial of the Employer's motion to amend the *Excelsior* list did not moot the issues concerning the eligibility of the challenged voters. Thus, while the Board's decision sustained the Regional Director's refusal to permit an amendment to the *Excelsior* list, the Board's decision did not preclude the parties from resolving the issue of the challenged voters' eligibility in the context of the instant proceedings.

to invalidate or change the eligibility date and do not seek to define the appropriate bargaining unit.

Accordingly, based on the evidence produced during the course of this hearing and based on the content of the posthearing briefs and attachments thereto, I find that insufficient basis exists to establish that the Regional Director's refusal to permit an amendment to the *Excelsior* list warrants overturning the election, and I recommend that Objection 1 be overruled.

B. *Analysis of Objections 2 and 3*: As discussed in the analysis of the challenged ballots and as will be explored in greater detail under Objection 5 below, in *Daniel Construction*, supra, and progeny, the Board defined the appropriate eligibility factors to be used in the construction industry. The *Daniel* formula established, inter alia, that, unless employees are on layoff status as of the eligibility date, they must be employed as of the established eligibility date in order to vote in a Board-conducted election. Since the four new hires in this case were not among the employees on layoff status, the *Daniel* formula required that they be employed as October 15, 1995, in order to vote. As noted in the discussion concerning the challenged voters above, the four challenged voters were hired during November and December 1995, well after the eligibility date. While the evidence may tend to support the Employer's assertion that the new hires may have worked a number of days more than certain of the employees whose names were included on the *Excelsior* list, such evidence does not detract from the fact that the new employees simply were not employed as of the official eligibility date of October 15, 1995.[18] Accordingly, as noted in the section addressing the challenged ballots, these voters were appropriately challenged by the Board agent and it is recommended that the Objections 2 and 3 be overruled.

OBJECTION 5

**The Regional Director erred in the October 20, 1995 Decision and Direction of Election by misstating the *Daniel* formula for determining voter eligibility, as modified by the decision in *Steiny & Co.***

In support of its allegation that the *Daniel* formula was misstated, the Employer offered the testimony of Mr. Upshur and various documents, including the Decision and Direction of Election (Emp. Exh. 1), a copy of the initial *Daniel* case (Emp. Exh. 4), a copy of pages 342–343 of the Board's Representation Casehandling Manual (Emp. Exh. 3), the Board Agent's November 3, 1995 letter concerning the election (Emp. Exh. 12), and the non-Board affidavit by the Employer's bookkeeper, Teresa Kulinowski (Emp. Exh. 14).

The Regional Director's Decision and Direction of Election, provides, at page 20:

> In *S. K. Whitty & Co.*, 304 NLRB 776 (1992) the Board modified its longstanding eligibility formula used in the construction industry that was enunciated in *Daniel Construction Co.*, 133 NLRB 264, as modified at 167 NLRB 1978 (1967). The formula adopted in *S. K. Whitty* did not last long, however, because in *Steiny & Co.*, the Board reviewed both *Daniel* and *S. K. Whitty* and concluded that the *Daniel* formula was the better approach to use in the construction industry. In *Steiny & Co.*, rather, the Board concluded that the *Daniel* formula is well settled, time tested, and familiar to construction industry employers and unions alike. It is our considered judgment that the case of administering the *Daniel* formula and the familiarity to all concerned outweigh any perceived limitations. [308 NLRB at 1327.]
>
> . . . .
>
> I shall apply the *Daniel* formula to determine eligibility of employees in this case. Thus, in addition to those eligible to vote under the traditional standards. Laid-off unit employees are eligible to vote in an election if they were *employed by the Employer for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment by the Employer in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date.* Of those eligible under this formula, any employees who quit voluntarily or had been terminated for cause prior to the completion of the last job for which they were employed is excluded and disqualified as eligible voters. [Emphasis added.]

In its brief at page 12, the Employer asserted that the true pronouncement of the *Daniel* formula is contained in the Board's own Casehandling Manual. The Employer quoted an excerpt, from the manual (p. 342) in declaring that the ''true pronouncement'' of the *Daniel* formula is as follows:

> The *Daniel* formula provided that in addition to those eligible to vote under standard criteria, unit employees are eligible to vote under standard criteria [sic], unit employees are eligible if they have been employed 30 days or more with [sic] 12 months preceding the eligibility date for the election or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. [Emphasis added.][23]

1. *The Failure to Specify that Actual Days Worked were at Issue*: At the hearing, Mr. Upshur asserted that the alleged erroneous articulation of the *Daniel* eligibility formula in the Decision and Direction of Election (Decision) cost the Employer the election. He alleged that he was misled by the portion of the Decision which stated that either 30 or 45 days within specific time frames were to be counted to determine the eligibility of laid-off employees. Mr. Upshur testified that he interpreted the language in the Decision to mean that employees had to be employed for at least 30 or 40 calendar days within the relevant time periods in order to be included

[18] Among the employees who worked less time than the new employees prior to the election were those employees whose eligibility is at issue in Objections 5–10.

[23] Although not specifically mentioned in the Employer's brief, the manual confirms that *Steiny & Co.*, 308 NLRB (1992), reaffirmed the Board's decision to apply the *Daniel* formula, and notes that, under *Steiny*, that the formula does not affect core employees who would be eligible to vote under ''traditional standards.'' [Emphasis added.]

in the *Excelsior* list.[24] Mr. Upshur alleged that he did not seek clarification, because he believed that he understood what was required. He admitted that he did not confer with his legal counsel concerning the matter because the Decision and the subsequent written communications he received from the Regional Office reinforced his perception that calendar days, rather than working days were to be counted for eligibility purposes. Mr. Upshur alleged that he instructed his bookkeeper, Teresa Kulinowski, to compile the eligibility list based on his instructions, including his understanding that calendar days, rather than actual days worked, were to be counted for eligibility purposes.

Mr. Upshur asserted that, between the date the *Excelsior* list was submitted and the date of the election, he received other documents which reinforced his perception that he had accurately interpreted the aforementioned provision in the Decision. Mr. Upshur asserted that his conviction that calendar days were to be counted for eligibility purposes was subsequently reinforced on his receipt of the November 3, 1995 letter from Board Agent Comstock. That letter (Emp. Exh. 12) used the term ''days'' in defining the eligibility of laid-off employees, but specifically referenced ''working days'' in describing notice posting requirements. Page two of the letter contains instructions for posting of the notices and states:

> 1. The Employer shall post copies of the Board's Official Notice of Election in Conspicuous places at least 3 *full working days* prior to 12:01 a.m. of the Day of the Election.
>
> 2. The terms ''*working day*'' shall mean an entire 24-hour period excluding Saturdays, Sundays and Holidays. [Emphasis added.]

Mr. Upshur also testified that his perception was also reinforced by the eligibility language contained in each successive Notice of Election which he posted at the facility. Besides the language defining the bargaining unit and its statutory exclusions, the notices (see Emp. Exh. 6) each contained a paragraph entitled ''Eligibility Rules'' which referenced work performed during a particular payroll period but did not mention working days.

Mr. Upshur asserted that, because of the imprecise language contained in the Decision, the *Excelsior* list which was submitted by the Employer erroneously included the names of three employees who were not eligible to vote. Those employees voted unchallenged because the Employer was not aware, as of the date of the election, that they had erroneously been included on the *Excelsior* list. Mr. Upshur alleged that, because of the above-referenced language contained in the Decision and other documents received from the Regional Office, he remained convinced until after the election that the laid-off employees on the *Excelsior* list were eligible to vote.

Mr. Upshur testified that he did not learn that the *Daniel* formula had been misstated by the Regional Office or that he had misapplied the formula until several days after the election. In reviewing the results of the election with counsel, it became apparent to Mr. Upshur that three individuals who were ineligible to vote had been erroneously included on the *Excelsior* list and had been allowed to vote without challenge. The timecards of two of these employees, Harold Johnson (Emp. Exh. 13-A) and George Norton (Emp. Exh. 13-B), showed that neither had worked the required number of days prior to the eligibility date in order to vote unchallenged in the election. Mr. Upshur also alleged that he also came to realize after the election that the name of Foreman Robert Carter (Emp. Exh. 13-C) had erroneously been included because Carter had quit his employment. Upshur explained at the hearing that, it was the Employer's policy to decline to rehire any foremen who quit their employment. Since Carter quit on May 17, 1995, he allegedly had no expectation of continued employment and he should not have been permitted to vote.[25] According to Mr. Upshur, the confusing language and the alleged erroneous statement of the eligibility formula when compared to *Daniel Construction*, supra (Exh. 4), were factors which cost the Employer the election.

In order to corroborate Mr. Upshur's assertions concerning the confusion generated by the Decision, the Employer introduced a non-Board statement which Mr. Upshur asserted was offered and signed by the Employer's bookkeeper, Teresa Kulinowski.[26] The statement provides that Kulinowski received an assignment to compile the list of eligible voters. The statement quoted a portion of the Decision previously cited above and the statement alleged that such language was relied upon by Kulinowski in preparing the *Excelsior* list. The affidavit attributes Kulinowski with stating:

> In January of 1996, I learned the information was not complied in accordance with the intent of the Board directive issued on October 20, 1995. . . . Since the word ''days'' was not adequately defined in the directive, I interpreted ''30 days'' and ''45 days'' to be ''calendar days.'' I later learned the intent of the October 20, 1995 directive was to compile ''work days.''. . . I then compiled the voter list according to the correct definition of eligible voters and found the following voters were ineligible to vote: Harold Johnson, George Norton, Jr. and Bobby Carter.

## Analysis and Conclusions

1. *The Daniel Formula*: Employees eligible to vote under the Board's standard criteria are by those employees hired and working on the eligibility date. For the purpose of determining which other employees in the construction industry who are eligible to vote, the Board required the application of an additional formula. In *Daniel Construction Co.*, 133 NLRB 264, 267 (1961), the Board concluded that, in addition to employees eligible to vote under the Board's standard

[24] Mr. Upshur acknowledged that he had not read the *Daniel* case and progeny or the manual excerpt prior to preparing the list, and alleged that he relied solely on the language in the Decision and Direction of Election in concluding that calendar days rather than working days were to be counted to determine voter eligibility for laid-off employees.

[25] It does not appear that Carter's inclusion on the *Excelsior* list is attributable to the Regional Office staff, as the Decision and Direction of Election, the Board agent's letter and the Notices clearly state that individuals who have terminated their employment and have no expectation of further employment are to be excluded and are ineligible to vote.

[26] Mr. Upshur attributed Kulinowski's absence from the hearing to her work responsibilities at the Employer's office.

criteria (those hired and working on the pertinent date) certain of those laid-off employees had a sufficient continuing interest in their working conditions which would warrant their participating in the upcoming election and the Board set forth the formula for determining which laid-off employees were to be determined eligible to vote as follows:

> [. . .] in addition to those in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 or more days within the period of 24 months, immediately preceding the eligibility date for the election hereinafter directed shall be eligible to vote.

That formula was subsequently modified in *Daniel Construction Co.*, 167 NLRB 1078, 1079 (1967), to exclude from eligibility those employees who had either quit or been lawfully discharged:

> Accordingly, we find that, in addition to those employees in the unit who were employed during the payroll period immediately preceding the date of the issuance of the Regional Director's Notice of Second Election in this proceeding, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election hereinafter directed, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, shall be eligible to vote.

The Board revised the formula for a brief period of time so as to include the factor of recurrent employment or a single period of employment for at least 90 days in *S. K. Whitty & Co.*, 304 NLRB 776, 777 (1991), before returning to the same formula previously set forth in *Daniel* II.

In *Steiny & Co.*, 308 NLRB 1323, 1327–1328 fn. 13 (1992), the Board confirmed that it was reaffirming and modifying the *Daniel* formula:

> Although we return to the *Daniel* formula, as modified, and overrule the *S. K. Whitty* modification, we make one *slight modification* to *Daniel*. To avoid any confusion regarding the meaning of the Board's use of the term ''days,'' *all references to the number of days of employment necessary within the periods specified in the formula will be revised to add the words ''working'' days*, i.e., ''30 working days,'' and ''45 working days.'' The purpose of this change is to make clear that if an employees [sic] works any portion of a working day, it is counted as 1 day for purposes of the formula. [Emphasis added.]

The *Steiny* modification of the *Daniel* formula is the current status of the law on this issue. See *Brown & Root, Inc.*, 314 NLRB 19, 28–29 (1994); *Delta Diversified Enterprises*, 314 NLRB 946 (1994).[27]

2. *The Alleged Ambiguity Regarding Working Days*: I find that the articulation of the *Daniel* formula contained in the Decision and Direction of Election is not contrary to the cited manual provisions.[28] However, as noted above, *Steiny* specifically held that, in order to avoid confusion, reference to ''days'' of employment in the *Daniel* formula would be revised to add the words ''working days.'' Neither the Decision and Direction of Election nor any of the other subsequent documents which were sent to the Employer regarding eligibility contained the clarification set forth in *Steiny*. I credit Mr. Upshur's assertion that he and Kulinowski were both misled by the ambiguous language in the Decision and Direction of Election and that their reasonable interpretation of the ambiguous language led to the erroneous inclusion of ineligible voters on the *Excelsior* list.[29] The Employer remained unaware of the error until after the election and, accordingly, was unable to avail itself of the challenged ballot procedure to call into question the eligibility of such employees.

It is noted that the Board has previously sustained objections to elections when ambiguity attributed to the Agency causes objectionable conduct. Thus, *Club Services*, 317 NLRB 349 (1995), the Board concluded that Section

[27] It is noted that some potential for confusion may also result because of the way in which reference to the *Daniel* decision has been cited in Board cases. Thus, the official cite appears to be *Daniel Construction Co.*, 133 NLRB 264, 267 (1961), modified 167 NLRB 1078) (1967), reaffd. in *Steiny & Co.*, 308 NLRB 1323 (1992). From a perusal of that citation, it is not clear that *Steiny* has also modified, rather than merely reaffirmed *Daniel*. Accordingly, a party may conclude that it would only be necessary to read the two *Daniel* cases in order to obtain a clear articulation of the *Daniel* eligibility formula. As a result, the formula could be incorrectly interpreted and misapplied. Confusion over whether *Steiny* actually modified the *Daniel* formula could also be exacerbated because *Steiny* may frequently be omitted when *Daniel* is cited. Thus in *Ellis Electric*, 315 NLRB 1187, 1188 (1994), *Steiny & Co.* was cited in a footnote which referenced the standard eligibility criteria. However, the subsequent citation in that same footnote to *Daniel* I and *Daniel* II made no reference to the fact that the *Daniel* formula had been either affirmed or modified by *Steiny*. Perhaps confusion could be avoided if the complete citation for *Daniel* I and II was to be consistently set forth in Board cases and if those official citations to the *Daniel* cases were changed to read: *Daniel Construction Co.*, 133 NLRB 264, 267 (1961), modified 167 NLRB 1078 (1967), reaffd. and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992). In this way, readers would know to resort to *Steiny* for a full explication of the *Daniel* formula.

[28] Indeed, the Employer quoted in its brief what it asserted to be the correct articulation of the *Daniel* formula by citing an excerpt from the Board's manual. That excerpt from the manual references the *Daniel* and *Steiny* cases, but makes no particular mention of ''working days'' in that formula.

[29] I have discredited much of Mr. Upshur's testimony, but I did find him to be a candid witness with respect to his confusion as to whether calendar days or actual days worked were to be counted in determining the eligibility of laid-off employees. I also credit his assertion that this confusion was caused by the language in the Decision and that his misperception was reinforced by the subsequent documents he referenced that he received regarding the election. That particular testimony appeared credible not only because it was corroborated by the statement of Kulinowski, but also because of the candor and forthright nature of Mr. Upshur's testimony on this issue. It is noted, moreover, that Mr. Upshur's testimony regarding the reasonable uncertainty generated by the language in the Decision regarding calendar vs. working days was uncontroverted by the Petitioner and the counsel for the Regional Director.

103.20(c) of the Board's Rules was ambiguous and found that the election should be overturned. In that case, the employer interpreted a rule requiring the employer to provide notice of nonreceipt of the notice from the Regional Office within 5 *working days* to mean what it said: working days. It could not easily be perceived that what the Board intended was that notice be provided *at least 5 full working days prior to 12:01 a.m. of the day of the election*. The Board concluded that in light of the ambiguity of its rules, the employer was not estopped from objecting to the election because the notice was received too late for posting it 3 full days prior to the election. The Board, accordingly, sustained the objection and directed a second election. See also *Terrace Gardens Plaza*, 313 NLRB 571 (1993) (Employer declined to cooperate in furnishing information necessary to arrange a manual election and forced the inconvenience of a mail-ballot election. However, the employer was not estopped from prevailing in objections filed after it lost an election based on the Regional Office's failure to provide copies of the notice for posting 3 days before the mail balloting.)

I find that, in the instant matter, the erroneous inclusion of Norton and Johnson on the *Excelsior* list, was based on a reasonable interpretation of the ambiguous language in the Decision. Moreover, there is no evidence or assertion that the Employer has acted in bad faith in interpreting ''days'' to mean calendar days rather than ''working days.'' This particular error was not an insubstantial error as it was sufficient to affect the results of the election. Accordingly, I find that the ambiguity in the Decision with respect to ''working days''' prejudiced the Employer. I consider this portion of Objection 5 to be meritorious and I recommend that this part of the objection be sustained and that it be considered a basis for overturning the election.

We are cognizant of the fact that the Petitioner prevailed by a small margin at the election and we are also aware that the Petitioner has neither filed objections nor indicated that it desires a new election. However, the Board has previously required prevailing nonobjecting parties to an election to withstand the rigors of another election through no fault of its own. See *Avon Products*, 262 NLRB 46, 48 (1982) (Board concluded that its own procedural oversight caused the petitioner's failure to timely receive a complete *Excelsior* list with an expanded unit. Thus, although the employer complied *en toto* with its obligation and prevailed at the election by an extremely wide margin, a new election was directed). Similarly, see *Coca Cola Co. Foods Division*, 202 NLRB 910 (1973), *American Laundry Machinery Division*, 234 NLRB 630 (1978).

OBJECTION 6

**New evidence exists which establishes that the *Excelsior* list included voters who lacked a sufficient interest in the outcome of the election to warrant their inclusion because the employees lacked any reasonable expectation of continued employment with the Employer.**

Mr. Upshur alleged that it was not until January 30 or 31, 1996, that he learned, in conferring with counsel, that ineligible employees had been erroneously included on the *Excelsior* list. According to Mr. Upshur, the list erroneously included individuals who had not worked for the Employer for long periods of time and those who had quit their employment or were otherwise ineligible because they did not meet the eligibility requirements for laid-off employees under the *Daniel* formula. Mr. Upshur testified that it was his perception that the erroneous inclusion of four individuals on the *Excelsior* list had caused the Employer to lose the election.

Also in support of this objection, the Employer offered evidence previously cited under Objections 1, 2, and 3 above to the effect that employees Carter, Johnson, Norton, and Waldren, all of whom had voted without challenge, had worked for the Employer for fewer days as of January 26, 1996, than had the four challenged voters. The Employer asserted that the employees who had not worked for the Employer for months should be deemed to possess less of an interest in the outcome of the election than did the current employees.

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To the extent that a portion of this objection may constitute a reiteration of the portion of Objection 5 relating to the erroneous inclusion of the names of Norton and Johnson because of ambiguous language in the Decision. I find this portion of the objection to be meritorious and recommend that it be sustained.

To the extent that a portion of the objection constitutes a reiteration of Objections 1, 2, and 3, and a reiteration of the evidence offered in support of the challenged ballots, I conclude that the objection is without merit and recommend that it be overruled.

OBJECTION 19

**The events leading to the election held on January 26, 1996, are unprecedented in the history of the Board and warrant a setting aside of the election. A new election should be held utilizing a new *Excelsior* list which accurately reflects the employees who have a valid interest in the outcome of the election.**

In addition to the bare assertions contained in this objection, it appears to be the Employer's assertion in its brief that the cumulative effect of all of the conduct at issue in Objections 1, 4, 7, 8, 9, 10, 11, 12, 14, 15, and 17 should require that the election be overturned.[43] The evidence offered in support of Objection 19 is the same evidence previously presented and discussed concerning each of the 16 objections addressed in this Decision. It appears to be the assertion of the Employer that, considered cumulatively, the series of delays which caused rescheduling of the election, the alleged staleness of the *Excelsior* list, the alleged procedural errors as well as conduct attributed to the Petitioner and the Board agent during the election constituted extraordinary circumstances and requires that a new election be conducted.

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Objection 19, which apparently acts as a catch-all, appears to assert that for all of the reasons set forth in the prior ob-

[43] Significantly, the Employer's brief does not argue that Objection 5, the alleged misstatement of the *Daniel* formula, should be considered in connection with Objection 19. The Employer appeared to take a contrary position in its opening statement and its arguments and testimony at the hearing, however.

jections, the *Excelsior* list should be revised and a new election should be held. It does not appear, however, that the cumulative effect of any of these objections (except for the objections relating to the ambiguity in the articulation of the *Daniel* formula) would meet the Board's standards for justifying a new election. In light of all of the circumstances in this case, it does not appear that the election should be set aside for any reason other than the fact that the ambiguity in the articulation of the *Daniel* formula caused confusion, which, in turn, affected the composition of the *Excelsior* list, the effectiveness of the challenged ballot procedure, and the ultimate outcome of the election. Since such allegations affect discrete portions of Objections 5 and 6 and since Objection 19 is arguably a catch-all which would include the aforementioned sections of Objections 5 and 6, I recommend that such part of Objection 19 also be sustained. Accordingly it is recommended that Objection 19 be sustained only to the extent that it can be deemed to relate to the aforementioned meritorious allegations in Objections 5 and 6. It is recommended that the remaining allegations in Objection 19 be overruled. [Footnote omitted.]